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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 12

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 32–35) is reported in 132 F. Supp. 34. The report of the Interstate Commerce Commission (R. 7–25) is reported in 289 I. C. C. 49.

JURISDICTION

The judgment of the three-judge district court was entered on June 28, 1955 (R. 36), and notice of appeal was filed in that court on August 26, 1955 (R. 37). Probable jurisdiction was noted on January 9, 1956 (R. 38). The jurisdiction of this Court rests upon 28 U. S. C. 1253 and 2101 (b).

STATUTE INVOLVED

Sections 1 (6), 2, and 6 (8) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 (6), 2, and 6 (8), provide in pertinent part:

> § 1 (6). It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.
>
> § 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons

for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

* * * * * *

§ 6 (8). In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. * * *

QUESTION PRESENTED

Railroads serving North Atlantic ports have for many years published shipside rates on export freight, that is, rates covering both the line-haul service and wharfage and handling services at the piers. Where the railroads do not have their own piers, they provide the latter services through commercial terminal operators. The Government-owned Army Base piers at Norfolk, Virginia, have long been utilized by the carriers for handling a large amount of rail-water traffic. Immediately prior to 1951, these piers had been leased to, and operated by, a terminal company whose charges of one dollar per ton for wharfage and handling on both military and civilian freight were paid by the carriers. On May 1, 1951, because of the Korean emergency, the Government canceled the lease and resumed control of the piers, but permitted, to the extent consistent with military requirements, the

movement of civilian freight over the piers. The Government continued to employ a terminal operator to provide wharfage and handling on the military freight. The railroads continued to pay for the wharfage and handling on civilian freight but refused to do so for military freight moving under identical line-haul rates. The following question is presented:

Whether the railroads' failure to perform or to pay for wharfage and handling services (for which they were compensated under the export rates) in connection with the movement of military freight over the Army Base piers, while continuing to pay for such services on commercial traffic moving over the same piers at the same time, subjected the Government to unjust discrimination and constituted an unreasonable practice, in violation of the Interstate Commerce Act.

STATEMENT

Background facts: The interchange of export freight from rail to outbound water carriers generally requires the use of piers or wharves over which railroad cars may be moved to points where the freight can be unloaded and placed within reach of ships' tackle. Although railroads have no statutory obligation to provide these piers or to unload carload freight, they have ordinarily assumed the duty in respect of freight consigned for overseas shipment (R. 15). See *Loading and Unloading Carload Freight,* 101 I. C. C. 394, 396. The charges for the use of piers ("wharfage") and for the necessary unloading and placement of freight within reach of ships' tackle ("handling") may be imposed sepa-

rately from the charge for line-haul transportation, or may be included in a single-factor export rate providing for shipside delivery.

For many years, railroads serving North Atlantic ports have followed the latter method, providing both line-haul service and wharfage and handling in exchange for a single-factor export rate. In 1929, the Interstate Commerce Commission (by a 6–to–5 vote) upheld this practice of making an over-all charge against complaints by the War Department and North Atlantic port authorities that it prevented independent terminals from competing for the business and hence resulted in inadequate terminal facilities. The Commission held that, since the record did not show that existing facilities were inadequate, or that independent terminal operators were injured by the practice, the railroads should not be required to segregate and to publish separately their terminal service charges. *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663.

Where the railroads do not have their own piers, they have provided wharfage and handling through contracts with commercial terminal operators. This has been the situation at the Army Base piers in Norfolk, Virginia. Those piers were constructed, shortly after World War I, by the United States and thereafter leased to a succession of public terminal operators who, in turn, performed the services under contracts with the nine railroads which carry export freight to the piers (R. 449–452A). The railroads paid the terminal operators under tariffs pro-

viding that the latter's charges (up to a stated amount) would be "absorbed" by the carriers or "included" in the line-haul export rate. See *Wharfage, Handling, and Storage Charges at Norfolk*, 59 I. C. C. 488.

The World War II "Norfolk case": As a result of the abrupt increase in outgoing military traffic following American entry into World War II, the Government, in 1942, canceled the lease on the piers, and the Army took over their operation. The railroads continued to absorb the charges for wharfage and handling in respect of the *commercial* freight that continued to move over the piers, but refused the Army's request that they either perform the services or pay therefor on *military* freight, on the ground that under the applicable tariffs their obligation to provide the services terminated when the Army canceled the lease and resumed control. The Army thereupon filed a complaint with the Commission seeking reparations from the carriers for alleged violations of Sections 1, 2, 6, and 15 of the Interstate Commerce Act. After hearing, the Commission dismissed the complaint[1] and the district court upheld the order,[2] but the Court of Appeals for the District

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[1] *United States* v. *Aberdeen & Rockfish R. R. Co.*, 269 I. C. C. 141, affirming 264 I. C. C. 683.

[2] *United States* v. *Interstate Commerce Commission*, 92 F. Supp. 998 (D. D. C.). In an earlier phase of the case, this Court, in upholding the right of the United States to maintain the action, held that the case should be heard by a single district judge instead of the three-judge district court which ordinarily reviews Commission orders. *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

of Columbia Circuit reversed. *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (C. A. D. C.), certiorari denied, 344 U. S. 893.

In a lengthy opinion, the court of appeals held (p. 975) that certain of the Commission's findings lacked substantial evidentiary support, and that "certain of its legal conclusions are opposed to the 'standards established by Congress to determine when reparations are due.'" The court pointed out (pp. 964–965) that the Government sought reparations on two theories—first, that the applicable tariffs obligated the railroads to provide the pier services; and, second, that "quite aside from the tariff provisions it was unduly discriminatory for the carriers to refuse either to render the services or to make an allowance in lieu of performance in connection with traffic at the Army Base piers, while at the same time rendering them at other piers at Norfolk and elsewhere in connection with similar traffic." The court found that neither the change in proprietorship of the piers nor the "impracticality" of performance by the railroads after resumption of Army control rendered the tariff inapplicable, and that Army freight was entitled to the same service under the tariffs as civilian traffic (pp. 967–972). It further held (p. 973) that the Commission's conclusion that the railroads had not unlawfully discriminated against the Government was not justified by the legal theory on which it was rested—i. e., that the Army's action in taking over the piers converted them from "public" to "private" facilities, and therefore relieved the carriers from any obligation to provide wharfage and handling thereon. The court

accordingly remanded the case to the Commission for further proceedings.[3]

The instant "Norfolk case": After the war, the Government again leased the piers to a private terminal operator (Norfolk Terminals Division of Stevenson and Young),[4] and the lessee entered into agreements with the railroads to provide terminal services (for a typical agreement, see Exhibit 29, R. 479). The railroads continued their single-factor shipside rates and continued, under their tariffs, to absorb wharfage and handling charges.[5] Prior to May 1, 1951, the railroads paid Stevenson and Young $.75 per ton for handling and $.25 per ton for wharfage on both Army and non-military freight (R. 12). On April 30, 1951, as a result of the Korean emergency, the Government again canceled the lease, and the Army resumed control of the piers to the extent

[3] After further hearing on remand, the Commission once again dismissed the complaint. *United States* v. *Aberdeen & Rockfish R. R. Co.*, 294 I. C. C. 203, rehearing denied, September 19, 1955 (Dkt. 29117). It held that the tariff did not apply to Army shipments; that, even if it did, the impracticality of providing the services to Army freight discharged the carriers' obligations thereunder; that the discrimination was not unlawful because of the differences in treatment of Army shipments; and that, in any case, failure to provide the services was not unreasonable since "no element of compensation for wharfage and handling is included in the line-haul export rates" (p. 220). The question of seeking court review of the Commission's latest order in the first "Norfolk case" is now under consideration by the Government.

[4] One portion of the piers has been used exclusively by the Navy since 1942 (R. 49). That portion was not covered by the lease, and is not involved in this case.

[5] The Pennsylvania Railroad's tariff (Ex. 30, R. 483) was found by the Commission to be typical of the tariffs published by most of the northern lines serving Norfolk (R. 16).

required to expedite necessary war materiel and to perform extensive repairs (R. 51, 383–388). However, those portions of the piers not required for immediate military use were made available to Stevenson and Young (under contract with the Maritime Administration) for the handling of commercial freight (R. 388–390, 430–447).[6] A substantial volume of civilian freight continued to move over the piers (see R. 351, 356), and Stevenson and Young solicited such business (R. 454C–D–E). The Army then contracted with Stevenson and Young to perform the necessary terminal services on military freight (Exhibits 4 and 5, R. 396–423).

Even before these arrangements were completed, however, the Army again requested the railroads either to provide the services or to pay it the amount which the carriers previously had paid the terminal operator (R. 368–370). The railroads refused to do so, on the ground that under their tariffs their obligation to provide wharfage and handling on Army freight terminated when the Government canceled the pier lease (R. 371–382).[7]

The Army then filed a complaint with the Interstate Commerce Commission seeking (1) an adjudication that the carriers' refusal to provide or pay for the services subjected it to unjust and unreasonable rates and charges in violation of Sections 1, 2, 3, and 6

[6] In practice, whatever facilities were not required for military purposes at any particular time were made available for commercial operations (R. 84).

[7] The decision of the court of appeals reversing the Commission's order in the first case was not rendered until July 18, 1952.

of the Interstate Commerce Act, and (2) a cease-and-desist order.[8]

After hearing, the Commission dismissed the complaint. *United States* v. *Aberdeen & Rockfish R. R. Co.*, 289 I. C. C. 49 (R. 7–25). The Commission held that the tariffs obligated the railroads to provide wharfage and handling only if the terminal operator performed the services as agent of the carriers (R. 20–21); that, after May 1, 1951, the terminal operator handled military freight as agent of the Army; and that the carriers accordingly were not required—or indeed authorized (R. 22)—to provide the services. The Commission rejected the Army's contention that, apart from any tariff obligation, it was unreasonable for the railroads to refuse to pay for the services on military traffic while continuing to pay for them on private traffic subject to the same rates (R. 21). The Commission gave substantially the same reasons it had given in rejecting a similar contention in the first case: that the railroads do not provide wharf facilities and services at Norfolk for shippers "which have their own wharf facilities and take possession of their shipments when delivered by rail at such private pier facilities," and they therefore accord the Army "the same treatment as is accorded any other shipper that takes possession

[8] Under 49 U. S. C. 66 the Government pays the bills of rail carriers without audit, but reserves the right to deduct any overpayments from sums subsequently due the carriers. If the carriers' failure to pay for wharfage and handling is found to be unjustified, the General Accounting Office will offset the overpayments against future bills from the carriers.

of its shipments when delivered by rail to its own private pier facilities" (R. 19); that, since "a commercial shipper who takes possession of his traffic when delivered to him at port facilities over which the rail carrier has no control" pays the higher domestic rate, the Army received the lower export rates only by virtue of the railroads' 1941 wartime "concession," which did not include wharfage and handling (R. 21); that, although the railroads had available port facilities "more than ample" to handle all military traffic moving over the Army Base piers since May 1, 1951 (R. 21), the Army did not wish to use those facilities but "for its own purposes" used its own piers (R. 22); and that, since it is "not unreasonable to refuse to extend wharfage and handling services to traffic handled over private piers when the shipper does not wish to use adequate facilities" of the railroads (R. 21), the latter were "relieved of any obligation which may have existed to provide wharfage and handling services on this traffic or to make an allowance therefor to the complainant" (R. 22–23). Chairman Alldredge dissented on the ground that he was "unable to discover any substantial differences" between this case and the earlier one, and that the court of appeals' decision in the first *Norfolk* case required a holding that the carriers' charges were unjust and unreasonable (R. 25).

In review proceedings brought by the United States, the majority of a three-judge district court[9]

[9] Since the Army's complaint before the Commission did not seek reparations, but sought only (1) an adjudication that the railroads' practices were unreasonable and (2) a cease-and-desist

(District Judges Pine and Keech) held that the Commission's order was supported by adequate findings which were, in turn, supported by substantial evidence (R. 33). The court distinguished the earlier court of appeals' decision on the ground that the tariffs "which are the sole basis of plaintiff's action, are materially different" (R. 33). It ruled that, since the Army's shipments did not conform to the specific conditions under which the tariffs provided for absorption of the terminal service charges, "the United States, like any other shipper similarly situated, is not entitled to such terminal services or any allowance therefor" (R. 33). Circuit Judge Bazelon, who had been a member of the court of appeals' panel which decided the first *Norfolk* case, dissented on the ground that the first decision "is controlling here and requires reversal of the Commission's order" (R. 35).

SUMMARY OF ARGUMENT

I

A. Section 2 of the Interstate Commerce Act makes it unjust discrimination for a railroad to charge different shippers different rates for the same service. Plainly, it is also unjustly discriminatory for a carrier to give different shippers different services under the same rate.

Since the piers in question were first opened more than thirty years ago, the carriers themselves have never physically performed the ancillary wharfage

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order, review proceedings were brought before a three-judge court rather than before the single-judge court which reviews orders denying reparations. See p. 6, note 2, *supra*.

and handling services which they undertook to perform under their shipside rates. They always have provided the services by paying a commercial terminal operator to perform them. Prior to May 1, 1951, they paid the terminal operator $1.00 per ton for providing such services on all freight that moved over the piers, both military and civilian. But after the Army, on May 1, 1951, resumed control of a portion of the piers in the interest of national defense, the railroads refused to pay that sum on military shipments (which were handled by the same terminal operator), although they continued to pay it on civilian freight moving over other portions of the same piers at the same time and under the same rate.

The only issue as to discrimination properly in this case is whether the railroads may refuse to *pay* for the service on Army freight while continuing to *pay* $1.00 per ton on civilian freight. Payment of $1.00 per ton on military freight obviously imposes no greater burden on the carriers than payment of $1.00 per ton on civilian freight. Under these circumstances, we submit that it was unjust discrimination for the railroads to refuse to pay that amount for some shippers (the Army) and continue to pay it for others similarly situated (civilian exporters). Cf. *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 63.

The wharfage and handling services are not, as the carriers suggest, "free"; they are a part of the total service which the carriers undertook to perform in return for the shipside export rates. The cost of such

services "enters into the total cost of the line haul to the shipper, regardless of whether [it] be separately stated or included in the line-haul tariff." *Barringer & Co.* v. *United States*, 319 U. S. 1, 8. Indeed, it was at the railroads' urging, and over strenuous objection, that the Commission, in 1929, permitted the publication of unsegregated line-haul rates covering both transportation and pier services, instead of requiring the carriers to state separately the charges for the ancillary services which they reached out and undertook to perform.

B. The reasons stated in the Commission's report fail to support its conclusion that the railroads' refusal to pay $1.00 per ton on Army freight, while continuing to pay that sum on non-military freight, is not unjust discrimination.

1. The Commission has erroneously relied upon its decisions holding that a commercial shipper is not entitled to delivery at his own private pier when the carrier is already providing delivery at adequate public piers. Even after the Army took over part of the piers in question, the railroads continued to move a substantial volume of civilian freight over those piers. Thus, they remained public facilities utilized by the carriers in serving commercial shippers. Moreover, the Government's shipment of military freight over the piers was not a matter of commercial convenience, as in the case of a private shipper who requests delivery at his own pier, but was done in the interest of national defense. Finally, all of the cases which have upheld a railroad's refusal to provide services at a shipper's own pier involved situations

where requiring the railroads to serve at a shipper's facilities would have imposed a greater burden on the carriers or would have resulted in competitive disadvantage to other shippers to whom the private pier was not available. In the instant case, however, no greater burden is imposed on the railroads if they pay $1.00 per ton on Army freight than if they pay that amount on civilian freight, and private shippers suffer no conceivable prejudice if the Government's military traffic is given as favorable treatment as their own shipments.

2. The Commission also held that, since "a commercial shipper who takes possession of his traffic when delivered to him at port facilities over which the rail carrier has no control" pays the higher domestic rate, the Army received the lower export rate only by virtue of the railroads' 1941 wartime "concession," and that this "concession" did not cover wharfage and handling. However, as the Court of Appeals for the District of Columbia Circuit pointed out in the first *Norfolk* case (198 F. 2d 967–968), this so-called "'concession' is not a concession at all. It is simply a recognition of the obvious export character of this freight and serves to remove any notion that the Government was to be required to pay the higher domestic rates on shipments of war materiel." When the carriers made the export rates applicable to overseas military shipments in 1941, they did not state that such rates did not include the wharfage and handling services which the rates normally covered. In any event, the carriers could not lawfully deny to the United States what they have continuously provided

to commercial shippers in circumstances which are wholly indistinguishable.

3. The Commission also attempted to justify the railroads' discriminatory refusal to pay for wharfage and handling on Army freight on the ground that the Army, by taking over part of the piers, prevented the carriers from performing the service. But, as the Commission itself noted, the railroads never had physically performed the services themselves. The carriers could have continued to provide the services on Army freight in the same way and in the same measure that they always had provided them, namely, by paying $1.00 per ton.

The Commission further held that the Army's failure to use other adequate pier facilities available at the port of Norfolk excused the railroads from providing the services at the Army Base piers. But the question whether it was discriminatory for the railroads to refuse to pay for the services at the Army piers does not depend on whether they could have provided the services at some other pier. It can also be said that commercial shipments moved over the Army Base piers might have been handled elsewhere; the crucial fact remains—such shipments did (and do) receive the $1-per-ton benefit contemporaneously denied the Army's shipments.

C. In 1950, the railroads amended their tariffs to provide that wharfage and handling would be absorbed at the port of Norfolk only when the services were performed by a named terminal operator as the carriers' agent. The Commission held that, since after May 1, 1951, the terminal operator performed the services on Army freight as the agent of the Army

and not of the carriers, the carriers were not required to absorb the charges on Army freight. But it has long been settled that, "[w]here a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511. The railroads cannot pay for wharfage and handling on civilian freight and "enforce an arbitrary rule which deprives another [shipper] of compensation for similar service" and which "operates so as to give one [shipper] an advantage of which another similarly situated cannot avail himself." *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, 220.

II

Section 2 discrimination aside, it was an "unjust and unreasonable * * * practice" (Section 1 (6)) for the railroads to limit absorption of wharfage and handling charges to shipments on which the terminal operator performed the service as the carriers' agent. The terminal-agent requirement is arbitrary because it bears no reasonable relationship to the tariff obligation to absorb the cost of such service. For, as we have shown, the railroads would have incurred no additional cost or burden by paying $1.00 per ton for services which the terminal agent performed on behalf of the Army instead of on behalf of the carriers. The result of the railroads' refusal to pay for wharfage and handling on Army freight was that the carriers were compensated for services which were covered by the shipside rate but which they did not in

fact provide, and that the Army was required to pay twice for the same services: once as part of the export rate, and a second time directly to the terminal operator. Since the tariff limitation imposed has no reasonable justification, the carriers cannot retain the portion of the shipside rate collected for the performance of services not actually provided. See *N. Y. Central R. R. Co.* v. *Gray*, 239 U. S. 583, 587.

ARGUMENT

INTRODUCTION

In holding that the Commission properly dismissed the Army's complaint, the district court stated that the tariffs were the "sole basis" of the Government's suit. In fact, however, the Government contended, both before the Commission and the district court, that, irrespective of the tariff provisions, it is unjustly discriminatory and unreasonable for the railroads to refuse to pay $1.00 per ton for wharfage and handling on Army freight while continuing to pay that amount on civilian traffic moving over the same pier at the same rates. As this Court recognized in an early stage of the litigation in the first *Norfolk* case (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437–438), even if "the allowances exacted from the Government were authorized in the railroads' published tariffs," they may nevertheless be "unlawful" if "unreasonable." The Commission never squarely faced up to this problem, but, instead, rested its decision on criteria which ignored the patent discrimination shown by the record. Furthermore, in relying on the tariffs as the basis for its conclusion that the

railroads were not obligated to provide wharfage and handling on Army freight after the Government canceled the pier lease, the district court, like the Commission, ignored the settled principle that "[w]here a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511; see *Union Pacific R. R. Co.* v. *Updike Grain Co.,* 222 U. S. 215, 220.

The admitted fact is that from the time the Army piers were first used in 1921 the railroads themselves have never physically performed the wharfage and handling services which they undertook to provide under their shipside rates. They have provided the services by paying a commercial terminal operator to perform them. Prior to May 1, 1951, they had been paying the terminal operator $1.00 per ton for providing such services on all freight, both military and civilian, which moved over the piers (R. 12). However, when the Army took over control of a portion of the piers, in 1951, in the interest of national defense, the railroads refused to continue paying that sum on the Army freight which moved over the Army portion of the piers, although they continued to pay it on civilian freight moving over other portions of the same piers at the same rates. Giving added emphasis to the discrimination is the fact that the Army retained the same terminal operator (Stevenson and Young) to handle Army freight whom the railroads previously had employed to handle all freight and whom the railroads continued to employ for handling civilian

freight. The only difference was that on Army freight this terminal operator performed the services as the agent of, and was paid by, the Army instead of the railroads.

The only issue as to discrimination properly in this case, therefore, is whether the railroads may refuse to *pay* for the service on Army freight (or to make a compensating adjustment by tariff) while continuing to pay therefor on civilian freight. There is no issue as to whether the railroads could be required themselves to *perform* the services on Army freight after the Army took over the piers, for the only obligation ever assumed by the railroads in connection with provision of services at these piers has been the financial one of absorbing the terminal operator's charges.

I

THE RAILROADS' REFUSAL TO ABSORB WHARFAGE AND HANDLING CHARGES ON ARMY FREIGHT TO THE SAME EXTENT THAT THEY ABSORB SUCH CHARGES ON CIVILIAN FREIGHT MOVING OVER THE SAME PIERS UNDER IDENTICAL RATES IS UNJUSTLY DISCRIMINATORY IN VIOLATION OF SECTION 2 OF THE INTERSTATE COMMERCE ACT

A. THE RAILROADS' REFUSAL TO PAY $1.00 PER TON ON ARMY FREIGHT WAS UNJUSTLY DISCRIMINATORY

Section 2 of the Interstate Commerce Act provides that a carrier is guilty of unjust discrimination if it

> shall, directly or indirectly * * * collect, or receive from any person or persons a greater or less compensation for any service rendered * * * in the transportation of passengers or property * * * than it * * * collects, or receives from any other person or persons for

> doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *.

In other words, it is unjustly discriminatory for a railroad to charge different shippers different rates for the same service. Necessarily, it is also discriminatory for a carrier to give different shippers different service under the same rate. As this Court repeatedly has held in the so-called freight car "spotting" cases, a carrier cannot perform accessorial services in a way in which "some shippers would pay an identical line-haul rate for less service than that required by other industrial plants." *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 197; cf. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 407–408; *B. & O. R. Co.* v. *United States*, 305 U. S. 507, 526.

We submit that when the railroads refused to pay for wharfage and handling on Army freight, while contemporaneously paying for such services on civilian freight moving over the same pier at the same rates, they received greater compensation from the Army than from civilian shippers for performing a "like and contemporaneous" transportation service "under substantially similar circumstances and conditions," in violation of Section 2. The railroads were required to perform the same physical duties in connection with the transportation and delivery of Army freight to the piers as in connection with nonmilitary freight. The only additional services required on Army freight were performed by the

terminal operator after the railroads had completed transportation (see *infra*, pp. 23–24), and their performance imposed no additional burden on the carriers (R. 144–146). Differences between shippers which are unrelated to the character or extent of the transportation services provided by railroads cannot justify giving one shipper more favored treatment than another. Thus, carriers may not give greater service at points served by competing carriers than at points where there is no carrier competition (*Wight* v. *United States*, 167 U. S. 512; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57), or give different service to shippers who are freight forwarders (*Interstate Commerce Commission* v. *Del., L. & W. R. R. Co.*, 220 U. S. 235; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344) or are themselves, carriers (*Interstate Commerce Commission* v. *B. & O. R. Co.*, 225 U. S. 326). Similarly, the railroads cannot treat the Army less favorably than civilian shippers merely because the Army has taken over a portion of the piers to which delivery is to be made.

The issue may be posed graphically by use of an example. Let us suppose that the export rate on lead pipes shipped from Columbus, Ohio, to the Army Base piers at Norfolk, Virginia, was $10 per ton. This would mean, under the terms of the railroads' tariffs, that an ordinary commercial exporter could get shipside delivery of a ton of pipes, *i. e.*, line-haul transportation plus wharfage and handling, for $10, with the railroad undertaking to pay the terminal operator, at $1 per ton, for his part in effecting such delivery. But on Army shipments of the same commodity,

shipped from the same point of origin at the same export rate, handled at the same Norfolk pier, and ultimately carried to the identical overseas destination, the rail carrier asserts a right to retain the full $10 and claims that the Army is required to bear the full cost of wharfage and handling at the pier. In terms of the example given, the railroad retains $9 ($10 less $1 paid to the pier operator) for the line-haul carriage of the ton of pipes shipped by the civilian exporter, while insisting on the right to retain a full $10 (the export rate undiminished by any contribution to the cost of terminal services) on the Army's identical shipment. By the same token, the Army pays $11 for the same transportation service (shipside delivery) for which the civilian exporter pays $10.

The fact, relied on by the Commission (R. 19–20), that after May 1, 1951, greater services were required on Army freight than on civilian freight cannot possibly justify the railroads' refusal to absorb *$1.00* per ton on Army freight. Although the Army paid the terminal operator *$2.87* per ton for servicing military freight after May 1, 1951 (R. 199), the Army sought from the railroads only the *$1.00* per ton which the latter previously had been paying for wharfage and handling on all freight, both civilian and military.[10]

[10] The record does not show the Army's wharfage expenses on military freight. However, the Army spent more than $3,000,000 in repairing the piers prior to reactivating the base in 1951 (R. 71). On the basis of the 70,000 tons of Army freight per month which moved over the piers after May 1, 1951, it would take the Army more than 10 years to recoup that sum at the rate of the 25 cents per ton which the railroads paid Stevenson and Young for wharfage (R. 198).

Thus, as the court of appeals pointed out in the first Norfolk case, it is clear that "the Government's action, taken in an emergency to assure a smooth flow of war materiel, [did not] increase the cost to the railroads or inconvenience them in any way." *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958, 970. The railroads were being asked to do no more than they always had done, namely, to pay $1.00 per ton an all freight moving over the piers, and that burden was the same no matter who was in control of the piers. Civilian shippers were free to make special arrangements with the terminal operator for additional services and to pay the extra charges therefor directly to the operator, without losing their right to absorption by the railroads to the extent stated in the tariffs (R. 185–186). Surely, the Government is not to be placed in any worse position because it requires additional services (for which it, too, is willing to pay) in the interests of national defense.[11]

If the carriers actually had been performing the services themselves (as the C. & O. Railway does at this port, see *Norfolk Port Commission* v. *Chesapeake & O. Ry. Co.*, 159 I. C. C. 169), or if they had undertaken to provide the service without reference to cost (*Rukert Terminals Corp.* v. *B. & O. R. Co.*, 283 I. C. C.

[11] Indeed, the Army could have left the piers in private hands and "still have controlled the piers and the shipments passing over them by the use of military priorities and routings." 198 F. 2d at 970. Because of the large anticipated volume of military traffic, however, the terminal operator would then have had "quite an army here telling us what to do, and how to do it" (R. 178). The Army's resumption of control was only a more efficient method of expediting the movement of military traffic (R. 80–81), and one which imposed no additional burden on the carriers.

5, 11), then changes in operating procedures on the piers which increased the carriers' burden might be significant. But where the only duty undertaken by the carriers is to absorb terminal charges at a designated pier up to a certain amount, there is plain discrimination if the carrier fails to absorb the same amount for every shipper. *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 63. "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511.

As we have noted (see Statement, *supra*, p. 5), it was at the railroads' urging, and over strenuous objection, that the Commission, in 1929, permitted the publication of unsegregated line-haul rates which covered both transportation and pier services. If at that time the Commission, instead, had required the railroads to state the charges for wharfage and handling separately from the line-haul rates, it seems undeniable that it would have been discriminatory for the railroads, after charging both the Army and civilian shippers $1.00 per ton for the services, to have refused to provide them on Army freight while continuing to do so on civilian freight. The railroads should not be permitted to obtain the $1.00 per ton windfall merely because, for competitive reasons of their own (see *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 684), they were per-

mitted to publish a single-factor rate covering both transportation and wharfage and handling. They should be required to refund the cost of providing services, covered by that rate, which they did not furnish.

The Commission and the railroads repeatedly refer to these services as "free" (Commission's Motion to Affirm, pp. 6, 7, 8, 9, 10, 11; Railroads' Motion to Affirm, pp. 5, 6, 7, 8), apparently on the theory that, if they are a gratuity, they may be supplied or withheld at will. But, as the Commission itself recognized when it permitted the railroads (at their own behest) to include the charges for the services as part of a "package," instead of stating them separately (see *supra,* p. 5), the absorption of wharfage and handling charges is a part of the total service which the railroads reached out and undertook to perform in return for the rates paid on export freight. The cost of wharfage and handling "enters into the total cost of the line haul to the shipper, regardless of whether [it] be separately stated or included in the line-haul tariff." *Barringer & Co.* v. *United States,* 319 U. S. 1, 8. The fact that particular services are part of the transportation "package" for which the shipper pays a single charge does not mean that such services are "free." This Court has held that "a service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it" (*Secretary of Agriculture* v. *United States,* 347 U. S. 645, 650), and it is no less plain

that such a service may not be abandoned in the absence of such a showing.[12]

Indeed, if the carriers have been giving "free" services all these years, they would appear to have been engaged in making illegal rebates, in violation of Section 6 (7), for more than a quarter of a century. As this Court has said, "Section 6 (7) * * * is violated * * * when carriers * * * render such terminal service free of charge." *United States* v. *Wabash R. Co.*, 321 U. S. 403, 410. Moreover, even if these were "free" services permitted by law, the carriers still would be bound by Section 2 to provide them without discrimination and in equal measure to all shippers. *Great Northern Railway* v. *Minnesota*, 238 U. S. 340.

The discriminatory character of the railroads' treatment of the Army is pointed up by the carriers' own explanations of their practices. As they stated (R. 293, 315), the competition of other ports was a controlling consideration both in fixing the level of export rates and in including wharfage and handling thereunder. See, also, *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663. However, since

[12] In *Terminal Charges at Pacific Coast Parts*, 255 I. C. C. 673, the Commission enjoined carriers from imposing a separate charge for terminal services which they had previously absorbed out of line-haul rates, on the ground that "the entire body of these export * * * rates have been established and maintained and adjusted over a long period of time in contemplation of the performance * * * of these terminal services as a part of the through transportation to and from the docks" (p. 677). The Commission held that the practical effect of separately charging for services which had previously been included "would be to increase the aggregate charge for transportation $1 a ton" (p. 675).

there was "no competition [among ports] in the handling of Government freight in the sense that competition exists on commercial freight" there was not "any reason to accord the Government export rates for the same purposes of stimulating business as exists in connection with commercial freight" (R. 293).[13]

Doubtless, the Army is a kind of "captive shipper" which, because of considerations of military necessity, is not free to patronize other ports if the rates become too high. But, obviously, discrimination against military shipments may not be countenanced because competitive conditions which induced the carriers to absorb wharfage and handling on civilian freight are not also applicable to military traffic.[14]

B. THE REASONS GIVEN BY THE COMMISSION DO NOT SUPPORT ITS CONCLUSION THAT THE RAILROADS' DIFFERENT TREATMENT OF ARMY AND CIVILIAN FREIGHT WAS NOT UNDULY DISCRIMINATORY

The Commission did not squarely face up to the question why it was not unjustly discriminatory for the railroads to refuse to pay the $1.00 per ton on Army freight while continuing to pay that sum on non-military freight moved over the same Base piers by the same pier operator. Instead, it rested its holding of non-discrimination on the following grounds: (1) that, since the railroads do not provide wharf facilities and handling at Norfolk for shippers

[13] The quoted testimony is that of the General Freight Agent (see R. 236) of the Pennsylvania Railroad.

[14] Compare Section 6 (8), imposing special duties upon carriers in relation to military and governmental traffic.

"which have their own wharf facilities and take possession of their shipments when delivered by rail at such private pier facilities," they therefore accord the Army "the same treatment as is accorded any other shipper that takes possession of its shipments when delivered by rail to its own private pier facilities" (R. 19); (2) that, since "a commercial shipper who takes possession of his traffic when delivered to him at port facilities over which the rail carrier has no control" pays the higher domestic rate, the Army received the lower export rate only by virtue of the railroads' 1941 wartime "concession," and this "concession" does not cover wharfage and handling (R. 21); and (3) that, although the railroads had available port facilities "more than ample" to handle all military traffic which moved over the Army Base piers after May 1, 1951 (R. 21), the Army did not wish to use those facilities, but "for its own purposes" used its own piers and thereby prevented the carriers from providing the services (R. 22). Each of these reasons, we submit, is unsound.

1. *The Army Cannot Be Treated as a Private Shipper Seeking Delivery at Its Own Pier*

Although the Commission attempted to distinguish between the Army's "own" and the railroads' pier facilities (R. 22), the fact is that the Army Base piers are a single physical unit, and that both before and after May 1, 1951, military and commercial freight cars were delivered to the same placement yards, switched on the same tracks, unloaded on the same

wharf and loaded into similar ships.[15] In another case, the Commission itself has held that, where non-military freight continues to move over piers which are open to public use, military control does *not* automatically convert them into private facilities so as to justify abandonment of terminal services. *Elimination of New York, N. H. and H. R. Pier Stations*, 255 I. C. C. 305.[16] In the instant case, a substantial volume of civilian freight continued to move over the Base piers alongside the Army freight (see R. 351, 356). Indeed, the carriers themselves must have continued to regard the piers as public, since, after May 1, 1951, they permitted Stevenson and Young to solicit civilian freight for export shipment over the piers (R. 454C–D–E). The fact that the owner of a public pier also uses it for the handling of his own freight does not convert it into a private pier, or deny him the right to the same services on his goods as are accorded other shippers who use the pier. Cf. *Inter-*

[15] The Army yardmaster (the same individual whom the terminal operator, while acting as the railroads' agent, had employed in that capacity prior to May 1, 1951) testified that the cars containing civilian freight were "handled in the same manner that we handle our cars" (R. 144). Ninety-eight percent of Army traffic was loaded into commercial ships (R. 71).

[16] There, a carrier proposed to eliminate terminal services at Government-owned piers in Boston (where it absorbed the cost of such services) and Providence, Rhode Island (where it made an allowance to the shipper therefor), on the ground that wartime resumption of military control converted the piers into private facilities and made continued provision of such services illegal. The Commission held that the piers remained public as long as commercial shipments continued to pass over them, and that the carrier could not abandon the services without a reduction of the tariff rate.

state Commerce Commission v. *Diffenbaugh*, 222 U. S. 42; *United States* v. *B. & O. R. Co.*, 231 U. S. 274. In short, even after the Army took over control of a portion of the piers, the piers remained public facilities. Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 507–508.

The Commission's analogy between the position of the Army after it had resumed control of a part of the piers and that of a private shipper who requests delivery at his own pier is unsound. For, as the court of appeals pointed out in the earlier case (198 F. 2d at 972), "[t]he Government's shipment of freight over its own piers was not a mere matter of commercial convenience or advantage," as in the case of a private shipper, but was "taken in an emergency to assure a smooth flow of war materiel" (p. 970). The considerations which determine the rights of a private shipper to services which inure to his commercial benefit obviously are not controlling in defining the extent of the railroads' duties with respect to military shipments designed to further the national defense interests. Indeed, in view of the Congressional policy reflected in Section 6 (8) of the Act that, in time of national emergency, the railroads are to give military traffic preferential treatment,[17] the Act cannot be read

[17] Section 6 (8) provides that "[i]n time of war or threatened war * * * carriers shall adopt every means within their control to facilitate and expedite the military traffic." It further provides that, upon demand on the President, preference and precedence shall be given for the transportation of troops and war material. Cf. also Section 22 of the Act, which permits the carriers to provide transportation free or at reduced rates for the United States.

so as to permit the carriers to take advantage of such an emergency to charge more for the same service on military than on civilian traffic.

Furthermore, all of the cases which have upheld a railroad's refusal to provide services at a shipper's own pier when it already is providing the same at adequate public piers involve situations where requiring the railroad to serve at the shipper's facilities would have imposed a greater burden on it (*e. g., Weyerhaeuser Timber Co. v. Pennsylvania R. Co.*, 229 I. C. C. 463, 473),[18] or would have resulted in competitive disadvantage to other shippers to whom the private pier was not available (cf. *Merchants Warehouse* case, *supra*; *B. & O. R. Co. v. United States*, 305 U. S. 507, 524). In the instant case, however, military and civilian freight are delivered to the same piers and, as we have shown (*supra*, pp. 23–25), no greater burden is imposed on the railroads if they pay $1.00 per ton on Army freight than if they pay that amount on civilian freight. The Army Base pier facilities are available to both commercial and military shipments, and private shippers suffer no conceivable prejudice if the Government's military traffic is given

[18] In the *Weyerhaeuser* case, the Commission held that a carrier which had undertaken in its tariffs to provide accessorial services at certain designated public piers was not required to provide the services at another public pier requested by the shipper. The reasons for that result were "the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the concentration over a limited number of piers, and the conservation of revenue" (229 I. C. C. at 473).

as favorable treatment as commercial traffic." The carriers' position thus falls of its own weight; the railroads could not continue to pay the $1 per ton on civilian shipments moved over the Base piers and disclaim, in the same breath, an obligation to give similar treatment to military freight moved over those piers. By whatever adjective described, they are the same piers.

2. *The Alleged "Concession" by Which the Army Received Export Rates Did Not Justify the Railroads in Refusing to Pay for Wharfage and Handling on Army Freight*

For competitive reasons, railroads frequently fix lower freight rates on shipments destined for export than on domestic shipments. And as "a policing measure," in order to "prevent shippers of domestic freight from obtaining the lower export rate by misrepresentation or chicanery," export freight tariffs customarily apply the export rates "only to freight remaining in the railroad's possession until delivery to the ocean carrier." *United States* v. *Interstate Commerce Commission,* 198 F. 2d at 967. The tariffs in the instant case provide, however, that the export rates will also apply if satisfactory proof of export is given (*e. g.*, R. 457, 476C).

This last provision was written into the carriers' tariffs in 1941 at the request of the Secretaries of

[19] Nothing in this record suggests that private shippers were denied access to the piers because of the priority requirements of military traffic.

War and Navy, who sought express acknowledgment that military traffic sent to the port for export, and actually exported, would receive the export rate, even though the military authorities might take temporary possession of the freight at the pier preliminary to delivering it to the ocean carrier. See R. 21. Although the Commission describes this as a "concession" which did not include or cover wharfage and handling, the fact is, as the court of appeals pointed out in the first case (198 F. 2d 967–968), that the so-called " 'concession' is not a concession at all. It is simply a recognition of the obvious export character of this freight and serves to remove any notion that the Government was to be required to pay the higher domestic rates on shipments of war materiel." A failure to apply the export rate to this export traffic—traffic, as the carriers well knew, destined for overseas theatres—would have been a grossly unreasonable practice.[20]

The Commission reasons, however, that the carriers' agreement (erroneously described as a concession) that the export rates would be applicable to military

[20] The railroads do not contend that the Army freight here involved was not in fact "bona fide export traffic" (*id.* at 967), and the record shows (R. 136–137) that the Army did give the carriers proof of export. Such proof consisted of a certificate, executed by the responsible Army officer on the original bill of lading, that the "shipment is for export" (R. 136). On the occasional instances when such a shipment was not exported but was rerouted back to a supply depot, the carriers were promptly so notified in writing (*ibid.*). The carriers plainly accepted such proof of export as adequate; they did not request the Army to furnish any additional proof. Cf. *United States* v. *Interstate Commerce Commission*, 198 F. 2d at 967, n. 9.

traffic destined overseas and sent to ports of embarkation, such as Norfolk, does not mean that the carriers also agreed to assume an obligation in respect of wharfage and handling. To this there are two answers. First, the carriers expressed no qualification when they declared the export rates applicable, and the pertinent rates, as shown above (pp. 5-6, 8), have long covered wharfage and handling (subject, of course, to the $1 per ton limitation). As the court of appeals stated it in the earlier *Norfolk* case (198 F. 2d at 968), there is no basis for the Commission's view that "simply because these shipments received the export rates by virtue of the special tariff provision, they were not entitled to receive all the services ordinarily covered by those rates." Secondly—and this is the core of the matter—the carriers could not, in any event, lawfully deny to the United States what they have continuously provided to commercial shippers in circumstances which are wholly indistinguishable.

3. *The Government's Action in Taking Over Part of the Piers Did Not Prevent or Excuse the Railroads From Providing Wharfage and Handling*

The Commission also attempted to justify the railroads' discriminatory refusal to pay for wharfage and handling on Army freight on the ground that the Army, by taking over part of the piers, prevented the railroads from performing the services. Such prevention of performance, it held, discharged the carriers' obligation to perform, because "[w]hatever transportation service the law requires the carriers to supply they have the right to furnish" (R. 23).

But the Government's taking over a portion of the piers did not prevent the carriers from providing the services there.[21] For, as the Commission itself noted (R. 22), the railroads never had physically performed the services themselves, and they could have continued to provide the services on Army freight in the same way they always had provided them, namely, by paying $1.00 per ton. The Army did not prevent such performance, but on the contrary requested the railroads to continue making the payments. It was the railroads which refused to perform.

The Commission further held that the Army's failure to use other adequate railroad pier facilities available in the port of Norfolk excused the railroads from providing the services at the Army Base piers. But the question whether it was discriminatory for the railroads to refuse to pay for the services at the Army piers does not depend on whether they could have provided the services at some other pier. The

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[21] *Atchison, T. & S. F. Ry Co.* v. *United States*, 232 U. S. 199, the sole authority cited by the Commission for the proposition that carriers have the right to provide whatever services the law requires them to perform (R. 23), is not in point. There, carriers were required by the Hepburn Act to supply ice for refrigerator cars, and the Court held that, since the carriers themselves were performing the service, individual shippers had no right to supply their own ice and receive an allowance therefor from the railroads. The Court pointed out (p. 215) that it would be unfair to the carriers to make them stand by to meet the "haphazard" demands of individual shippers. In the instant case, however, the obligation to provide wharfage and handling was voluntarily assumed by the carriers, not imposed by law; was met not by personal performance but by payment; and would impose no additional burden on the carriers if such payment were made on Army as well as on civilian freight.

adequacy of other pier facilities in a port is relevant where a shipper seeks carrier performance of terminal services at a pier other than that which the carriers serve. The Commission has held that, in such circumstances, if the carrier-designated piers are adequate, the railroads cannot be required to provide the services elsewhere. See, *e. g., Norfolk Port Commission* v. *Chesapeake & O. Ry. Co.*, 159 I. C. C. 169. Here, however, the applicable tariffs specifically provide for delivery to the Army Base piers (which concededly are adequate and have been served by the carriers since they were built), and, as we have shown, the line-haul rates to these piers cover wharfage and handling. The carriers have never ceased to pay the pier operator $1 per ton on commercial traffic handled at the Army Base piers. It is thus an irrelevant response to the charge of discrimination that there may be other adequate piers at Norfolk.

C. THE DISCRIMINATION IS NOT LAWFUL BECAUSE IT WAS ACCOMPLISHED PURSUANT TO TARIFF PROVISIONS

In 1950, the railroads amended their tariffs to provide that wharfage and handling costs would be absorbed at the port of Norfolk only when the freight moved over wharves owned or leased by Stevenson and Young and when the services were performed by the latter as the carriers' agent (R. 16). The Commission held (R. 18–19, 22) that, since, after May 1, 1951, Stevenson and Young performed the services on Army freight as the agent of the Army and not of the carriers, the carriers were not required, or even authorized, to absorb the charges on Army freight.

But it has long been settled that "[w]here a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." *Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 511; *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, 220. Thus, in the *Updike* case the tariff stated that the railroad would pay grain-elevator operators an "allowance" for unloading grain from its cars, provided that the empty cars were returned within 48 hours. The Updike Company performed the unloading service but, because of its distance from the railroad, was unable to return the cars within the prescribed time, and the railroad refused to pay the allowance. This Court held that, despite Updike's non-compliance with the 48-hour condition in the tariff, the carrier had no "power to make such a discrimination" by denying the allowances to Updike while making them to other grain elevator operators. It stated (p. 220):

> The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service * * *. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself.

Similarly, in the instant case, the railroads cannot pay for wharfage and handling on civilian freight

and "enforce an arbitrary rule which deprives another [shipper] of compensation for similar service." Since (as we have shown in Point I A, *supra*) payment of $1.00 per ton on Army freight would impose no greater burden on the railroads than payment of that sum on non-military traffic, the condition in the tariffs which attempts to limit absorption of wharfage and handling charges to situations where the terminal operator performs the services as the railroads' agent is "unfair and unreasonable" because it "operates so as to give one [shipper] an advantage of which another similarly situated cannot avail himself."[22] In short, a railroad cannot escape the statutory ban aganst discrimination by incorporating in its tariff a condition which operates discriminatorily.[23]

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[22] Indeed, this is even a stronger case than *Updike* for disregarding the tariff condition. In *Updike*, the provision was designed to promote a legitimate transportation objective, namely, prompt return of the cars. In the instant case, however, no valid transportation end would be served by limiting wharfage and handling payments to civilian freight.

[23] The discriminatory effect of applying the terminal-agent condition to justify the railroads' refusal to pay for the services on Army freight is emphasized by the fact that the literal terms of the tariffs do not permit the railroads to pay for the service even on civilian freight. The tariffs provide that the railroads will absorb the charges only on wharves "owned or leased" by Stevenson and Young (R. 16). However, after May 1, 1951, no part of the Army Base piers was owned or leased by that firm; it operated the portion of the piers over which civilian freight moved pursuant to an operating contract with the Maritime Administration (R. 63).

II

THE RAILROADS' REFUSAL TO PAY FOR WHARFAGE AND HANDLING ON ARMY FREIGHT WAS AN UNJUST AND UNREASONABLE PRACTICE IN VIOLATION OF SECTION 1 (6) OF THE ACT

In Point I, we have shown that the railroads' refusal to pay $1.00 per ton for wharfage and handling on Army freight, while continuing to pay that sum for those services on civilian freight moving over the same pier under the same export rate, was unjustly discriminatory, in violation of Section 2 of the Interstate Commerce Act. Such discriminatory treatment of the Army also would appear to constitute an unreasonable practice prohibited by Section 1 (6) of the Act. Cf. *Union Pacific R. R. Co.* v. *Updike Grain Co., supra,* 222 U. S. 215, 220; *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346; *United States* v. *B. & O. R. Co.,* 333 U. S. 169.

But wholly apart from discriminatory treatment of the Army as compared to private shippers, we submit that it was an unjust and unreasonable practice for the railroads to limit absorption of wharfage and handling charges to shipments on which the terminal operator performed the services as the carriers' agent. The terminal-agent requirement is arbitrary because it bears no reasonable relationship to the railroads' tariff obligation to absorb the cost of such services.

As we have shown, export rates to the Army Base piers cover wharfage and handling services. The carriers always have supplied such services by paying

private terminal operators to perform them rather than by performing the services themselves. Furthermore, such services were not "free," but were a component element of the transportation "package" which the shipper purchased when he paid the shipside rate (see *supra*, pp. 26–27).

Prior to May 1, 1951, the rate applicable to Army freight included wharfage and handling. After that date, however, although the rate remained the same, the Army received substantially less. The railroads would have incurred no additional cost or burden by continuing to provide the services after that date in the same way they had provided them previously, namely, by paying $1.00 per ton. Under these circumstances, such a reduction in service without any corresponding reduction in the rate is unreasonable. Cf. *Secretary of Agriculture* v. *United States*, 347 U. S. 645.[24]

The result of the railroads' refusal to pay for wharfage and handling on Army freight was that the carriers were compensated for services which were covered by the rate but which they did not in fact provide, and that the Army was required to pay twice for the same services: once as part of the export rate, and a second time directly to the terminal operator. Having elected to include wharfage and handling under a

[24] In order to amend their tariffs to eliminate wharfage and handling without reducing the rate, the railroads would be required to show at a hearing that the present rate is inadequate to cover both transportation and wharfage and handling. 347 U. S. at 650. Of course, if they could make such a showing, any elimination of wharfage and handling would be applicable to all shipments, not just military freight.

single-factor shipside rate, instead of segregating the charges therefor (see *supra*, p. 5), the carriers cannot refuse performance and yet retain the monies which provision of the services would have cost them. Cf. *Adams* v. *Mills*, 286 U. S. 397. If the charges had been segregated, plainly it would have been unreasonable for the railroads to collect and retain a charge for the services while failing to perform them. It is equally unreasonable, we submit, for the carriers to do the same thing when the charges are included in a single-factor rate. "What the railroads seek is the retention of money which they would have been obliged to disburse to the Terminal Corporation, had the war not led the Army to assume operation of the piers." *United States* v. *Interstate Commerce Commission, supra*, 198 F. 2d at 971.

The Commission held that when the Army resumed control of part of the piers, the railroads' assumed obligation to pay the terminal operator for wharfage and handling on Army freight was terminated. Assuming, *arguendo*, the correctness of that conclusion, it does not follow, as the Commission implies, that the railroads could then retain the money representing the cost of the services.

In *New York Central R. R. Co.* v. *Gray*, 239 U. S. 583, the railroad involved had agreed to pay one Gray $750 for making a map, $150 to be paid in cash and the balance by supplying him with transportation worth $600. After Gray had made the map and the carrier had paid him the cash and provided transportation valued at $55.77, the Hepburn Act of 1906 (34 Stat. 587) was passed, making it unlawful for

a carrier to furnish transportation for any consideration other than the regular fare paid in money. The railroad refused to furnish Gray with further transporation under the contract or to pay him the value of such transportation. This Court held that, although the Act had relieved the carrier of its obligation to provide the transportation, the carrier was required "to make just compensation in money for the unpaid balance" due Gray (p. 587).

Similarly, in the instant case, even assuming that the railroads' obligation to provide the services was discharged when the Army took over part of the piers, the railroads nevertheless are required "to make just compensation in money" to the Army covering the cost of the services which they undertook to provide in exchange for the rate charged.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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